

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

LISA MICHELLE DONALDSON, Plaintiff, vs. COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. 1:16-cv-03156-MKD ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 18, 20
--	--

15 BEFORE THE COURT are the parties' cross-motions for summary
16 judgment. ECF Nos. 18, 20. The parties consented to proceed before a magistrate
17 judge. ECF No. 7. The Court, having reviewed the administrative record and the
18 parties' briefing, is fully informed. For the reasons discussed below, the Court
19 denies Plaintiff's motion (ECF No. 18) and grants Defendant's motion (ECF No.
20 20).

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
7 limited; the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
11 (quotation and citation omitted). Stated differently, substantial evidence equates to
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
13 citation omitted). In determining whether the standard has been satisfied, a
14 reviewing court must consider the entire record as a whole rather than searching
15 for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record “is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ’s findings if they are supported by inferences reasonably drawn from the
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that [she] is not only unable to do [her]
14 previous work[,] but cannot, considering [her] age, education, and work
15 experience, engage in any other kind of substantial gainful work which exists in
16 the national economy.” 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.
19 §§ 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R.
3 §§ 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
12 §§ 404.1520(c); 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite her limitations, 20 C.F.R. §§ 404.1545(a)(1);
4 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that she has performed in the past
7 (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv). If the
8 claimant is capable of performing past relevant work, the Commissioner must find
9 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f). If the
10 claimant is incapable of performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
14 the Commissioner must also consider vocational factors such as the claimant's age,
15 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
16 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
17 Commissioner must find that the claimant is not disabled. 20 C.F.R.
18 §§ 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to
19 other work, analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ'S FINDINGS

8 Plaintiff applied for Title II disability insurance benefits and Title XVI
9 supplemental security income benefits on March 6, 2013, alleging a disability
10 onset date of January 1, 2011. Tr. 196-210, 220. The applications were denied
11 initially, Tr. 96-99, and on reconsideration, Tr. 102-13. Plaintiff appeared at a
12 hearing before an Administrative Law Judge (ALJ) on November 6, 2014, Tr. 522-
13 45, and at a supplemental hearing on January 14, 2015, Tr. 47-55. On February 18,
14 2015, the ALJ denied Plaintiff's claim. Tr. 26-46.

15 At the outset, the ALJ found that Plaintiff meets the insured status
16 requirement of the Social Security Act through June 30, 2016. Tr. 31. At step one,
17 the ALJ found that Plaintiff has not engaged in substantial gainful activity since
18 January 1, 2011, the alleged onset date. Tr. 31. At step two, the ALJ found
19 Plaintiff has the following severe impairments: posttraumatic stress disorder
20 (PTSD) in partial remission; attention deficit hyperactivity disorder (ADHD);

1 anxiety disorder, not otherwise specified (NOS) with history of panic attacks;
2 bipolar II mood disorder; methamphetamine dependence in reported remission;
3 alcohol dependence in reported remission; polysubstance abuse in reported
4 remission; and borderline personality disorder. Tr. 31-32. At step three, the ALJ
5 found that Plaintiff does not have an impairment or combination of impairments
6 that meets or medically equals a listed impairment. Tr. 32. The ALJ then
7 concluded that Plaintiff has the following RFC:

8 [T]he claimant has no exertional limitations. She can perform
9 detailed and complex tasks. The claimant is limited to occasional and
superficial public interaction. She is limited to superficial or casual
interaction with coworkers and supervisors. The claimant is not well
10 suited to be a member of a highly interactive or interdependent group.

11 Tr. 33. At step four, the ALJ found that Plaintiff is unable to perform any past
12 relevant work. Tr. 40. The ALJ found at step five that there are other jobs that
13 exists in significant numbers in the national economy that Plaintiff could perform
14 within her assessed RFC, such as kitchen helper, laundry worker II, industrial
15 cleaner. Tr. 41. On that basis, the ALJ concluded that Plaintiff was not disabled as
16 defined in the Social Security Act during the adjudicative period. Tr. 41.

17 On June 30, 2016, the Appeals Council denied review of the ALJ's decision,
18 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
19 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

2 Plaintiff seeks judicial review of the Commissioner's final decision denying
3 her disability insurance benefits under Title II and supplemental security income
4 benefits under Title XVI of the Social Security Act. ECF No. 18. Plaintiff raises
5 the following issues for this Court's review:

1. Whether the ALJ properly discredited Plaintiff's symptom claims; and
2. Whether the ALJ properly weighed the medical opinion evidence.

8 | ECF No. 18 at 6.

DISCUSSION

A. Medical Opinion Evidence

11 Plaintiff faults the ALJ for discounting the medical opinions of examining
12 psychologists Philip Barnard, Ph.D. and Roland Dougherty, Ph.D. ECF No. 18 at
13 7-14.

14 There are three types of physicians: “(1) those who treat the claimant
15 (treating physicians); (2) those who examine but do not treat the claimant
16 (examining physicians); and (3) those who neither examine nor treat the claimant
17 but who review the claimant’s file (nonexamining or reviewing physicians).”

¹⁸ *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).

19 "Generally, a treating physician's opinion carries more weight than an examining
20 physician's, and an examining physician's opinion carries more weight than a

1 reviewing physician's." *Id.* "In addition, the regulations give more weight to
2 opinions that are explained than to those that are not, and to the opinions of
3 specialists concerning matters relating to their specialty over that of
4 nonspecialists." *Id.* (citations omitted).

5 If a treating or examining physician's opinion is uncontradicted, an ALJ may
6 reject it only by offering "clear and convincing reasons that are supported by
7 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
8 "However, the ALJ need not accept the opinion of any physician, including a
9 treating physician, if that opinion is brief, conclusory and inadequately supported
10 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
12 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
13 may only reject it by providing specific and legitimate reasons that are supported
14 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
15 F.3d 821, 830-31 (9th Cir. 1995).

16 *1. Dr. Barnard*

17 Dr. Barnard performed a psychological evaluation in February 2013 and
18 diagnosed Plaintiff with bipolar disorder, NOS; PTSD, chronic; and polysubstance
19 dependence, in early full remission. Tr. 273-76. He assessed severe limitations in
20 Plaintiff's ability to adapt to changes in a routine work setting, complete a normal

1 work day and work week without interruptions from psychologically based
2 symptoms, and maintain appropriate behavior in a work setting. Tr. 275. He
3 assessed marked limitations in her ability to understand, remember, and persist in
4 tasks by following detailed instructions, perform routine tasks without special
5 supervision, communicate and perform effectively in a work setting, and set
6 realistic goals and plan independently. Tr. 275. The ALJ assigned the opinion
7 “little weight,” because (1) it was based on her unreliable self-reports, and (2) it
8 lacked a rationale or a citation to objective evidence. Tr. 38. Both Plaintiff and
9 Defendant agree that the ALJ was required to provide specific and legitimate
10 reasons to discount the opinion. ECF No. 18 at 7; ECF No. 20 at 12.

11 First, the ALJ gave the opinion little weight because it was “based, in large
12 part, on the claimant’s less than fully credible self-report.” Tr. 38. A physician’s
13 opinion may be rejected if it is based on a claimant’s subjective complaints which
14 were properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
15 2001); *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595 (9th Cir. 1999); *Fair*
16 *v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). However, the ALJ must provide the
17 basis for his conclusion that the opinion was based on a claimant’s self-reports.
18 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

19 Here, the ALJ identified the basis for his conclusion that Dr. Barnard’s
20 opinion was based on Plaintiff’s unreliable self-reports. First, he found that Dr.

1 Barnard relied upon Plaintiff's reports of audio hallucinations, Tr. 38 (referring to
2 Tr. 276 where Dr. Barnard determined Plaintiff had impaired perception based on
3 her report that she hears voices). However, Plaintiff's reports of audio
4 hallucinations are inconsistent in the record. In March 2012, Plaintiff told a
5 treatment provider that her prior hallucinations were drug-related. Tr. 359.
6 Plaintiff also has a history of denying the existence of hallucinations. *See* Tr. 280
7 (Jan. 2013, denying hallucinations); Tr. 281 (June 2012, denying hallucinations);
8 Tr. 293 (Feb. 2012, denying hallucinations/delusions); Tr. 322 (Aug. 2012 denying
9 hallucinations/delusions); Tr. 341 (April 2012, denying hallucinations/delusions);
10 Tr. 492 (Sept. 2014 denying hallucinations).

11 Second, the ALJ noted that Dr. Barnard relied upon Plaintiff's self-reported
12 short temper and low frustration tolerance as a basis for his conclusions. Tr. 38
13 (citing Tr. 273-76). The only time in the record Plaintiff lost her temper and
14 behaved aggressively was in the context of the two failed attempts at inpatient
15 substance abuse treatment, which she did not want to attend. Tr. 38. In February
16 of 2012 while waiting for a bed at a rehab facility, Plaintiff expressed that she did
17 not want to go to rehab and stated that she would make everyone there miserable
18 and that she would throw a chair through the window in the first week. Tr. 390.
19 When taken to this facility, she was refused admittance because of her behavior,
20 which included profanity, yelling at staff, and storming out. Tr. 382. Following

1 this, Plaintiff repeatedly expressed that she did not want to attend inpatient
2 treatment, Tr. 368, 380, and upon entering treatment on March 26, 2012, was
3 described as “hostile and angry.” Tr. 363. By April 3, 2012, Plaintiff was
4 discharged from treatment due to “disruptive, aggressive, and t[h]retening
5 behaviors. Five residents expressed safety concerns about her remaining in
6 treatment. When [Plaintiff] was approached about these concerns she escalated
7 and started yelling, punched a wall, and threw things around the rooms.” Tr. 344.
8 Despite these two episodes, in which Plaintiff appeared to act in a preplanned,
9 disruptive manner, there is no other report in the record of Plaintiff losing her
10 temper.

11 Third, the ALJ noted that Plaintiff’s “perception that she does not require
12 psychotropic medication indicates her symptoms are less troublesome than she
13 asserted at the evaluation with Dr. Barnard.” Tr. 38. Plaintiff asserts that this is a
14 separate and unique reason provided by the ALJ and it fails to meet the specific
15 and legitimate standard because it is inconsistent with the ALJ’s finding that
16 Plaintiff is less than fully credible concerning her symptom reports. ECF No. 18 at
17 10-11. However, this reason is further explanation by the ALJ supporting his
18 finding that Dr. Barnard relied upon Plaintiff’s unreliable self-reports. The ALJ is
19 asserting that Plaintiff’s reports of symptoms to Dr. Barnard were more severe than
20 her lack of medication usage indicates.

1 Therefore, the ALJ provided an adequate basis for his determination that Dr.
2 Barnard's opinion was based on Plaintiff's unreliable self-reports. As such, this
3 was a specific and legitimate reason to reject Dr. Barnard's opinion.

4 Next, the ALJ rejected the assessed limitations because Dr. Barnard "did not
5 provide a significant rationale or cite any objective signs in support of the
6 limitations he opined." Tr. 38. Factors relevant to evaluating any medical opinion
7 include the amount of relevant evidence that supports the opinion, the quality of
8 the explanation provided in the opinion, and the consistency of the medical opinion
9 with the record as a whole. 20 C.F.R. §§ 404.1527(c); 416.927(c); *Lingenfelter v.*
10 *Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th
11 Cir. 2007). "A medical opinion may be rejected by the ALJ if it is conclusory,
12 contains inconsistencies, or is inadequately supported." *Bray*, 554 F.3d at 1228;
13 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

14 Here, Dr. Barnard's check-the-box form provided no explanation for his
15 findings. He did not cite any clinical findings or test results. He cited two
16 symptoms, mood swings and anger, both of which were based on Plaintiff's
17 discredited self-reports and, as discussed above, her "anger" is not documented in
18 the record as her outbursts appeared to be preplanned. Accordingly, this was a
19 specific and legitimate reason to reject Dr. Barnard's opinion.

1 2. *Dr. Dougherty*

2 On December 3 and 9, 2014, Dr. Dougherty performed a consultative
3 psychological examination of Plaintiff. Tr. 494-521. He reviewed a substantial
4 amount of records, conducted a clinical interview, performed IQ testing, and
5 diagnosed her with the following: PTSD, in partial remission; ADHD; anxiety
6 disorder, NOS, with history of panic attacks; Bipolar II mood disorder, depressive
7 phase; methamphetamine dependence, in reported sustained remission; alcohol
8 dependence, in reported substantial remission; and polysubstance abuse, in
9 sustained remission. Tr. 506-07. As part of his medical source statement, Dr.
10 Dougherty stated the following:

11 She is likely to have a good deal of difficulty maintaining regular
12 attendance in the workplace at present, partly for motivational
13 reasons, and partly because of her depression and anxiety. For the
14 same reason she is likely to have difficulty completing a normal
15 workday/workweek without interruption from her depression, anxiety,
16 and PTSD symptoms. These same conditions are likely to make it
17 quite difficult for her to deal with the stress encountered in the
18 workplace.

19 Tr. 508. On an agency provided form, he assessed moderate limitations in
20 Plaintiff's ability to understand and remember complex instructions, to carry out
- complex instructions, and to make judgments on complex work-related decisions.

1 Tr. 519. He further assessed marked limitations in her ability to interact
2 appropriately with the public, interact appropriately with supervisors, interact
3

1 appropriately with co-workers, and respond appropriately to usual work situations
2 and to changes in a routine work setting. Tr. 520.

3 Again, both parties assert that the ALJ was required to provide specific and
4 legitimate reasons for discounting this opinion. ECF No. 18 at 7; 20 at 16. First,
5 the ALJ gave the overall opinion “some weight” because Dr. Dougherty “indicated
6 that claimant’s problems persisting at tasks and maintaining regular attendance in a
7 workplace were partly attributable to motivational problems.” Tr. 39. Medical
8 providers are not considered qualified to issue opinions based on non-medical
9 factors. *Sanchez v. Sec. of Health and Human Servs.*, 812 F.2d 509, 511 (9th Cir.
10 1987). Dr. Dougherty stated that Plaintiff “may have difficulty in persistence on
11 tasks due to her ADHD and motivational problems,” and that “[s]he is likely to
12 have a good deal of difficulty maintaining regular attendance in the workplace at
13 preset, partially for motivational reasons, and partially because of her depression
14 and anxiety.” Tr. 508. Here, the ALJ agreed and determined that Plaintiff’s
15 motivation to work, or lack thereof, was not a result of her medical impairments,
16 stating:

17 [Plaintiff] is fairly young and comes from a family where her mother did
18 everything for her [citing Tr. 487]. She said both of her parents spoiled her
19 [citing Tr. 497]. The claim was ill equipped to exercise responsibility adult
judgment when she left home and became involved with illegal drugs and
abusive boyfriends, which has not helped her develop any sense of personal
responsibility. Overall, it appears that if [Plaintiff] were motivated to
20 maintain employment she could.

1 Tr. 39. Therefore, the ALJ's reason, that Dr. Dougherty predicated part of his
2 opinion on Plaintiff's motivation, which was a non-medical factor, meets the
3 specific and legitimate standard.”

4 The ALJ then assigned “less weight” to Dr. Dougherty’s opinion, that
5 Plaintiff was moderately limited in the abilities to understand, remember, and carry
6 out complex instructions and to make judgements on complex work related
7 decisions as expressed on the agency supplied form, because of motivational issues.
8 Tr. 40. As discussed above, the medical providers are not considered qualified to
9 issue opinions based on non-medical factors. Therefore, the ALJ’s reason for
10 rejecting this portion of the opinion is legally sufficient.

11 The ALJ assigned “some weight” to Dr. Dougherty’s opined social
12 limitations on the agency’s form agreeing that Plaintiff “would clearly do better in
13 a position that does not involve intense interaction with others,” but not finding
14 limitations as severe as Dr. Dougherty’s opinion. Tr. 40. The ALJ found that
15 Plaintiff could “tolerate occasional and superficial public interaction and
16 superficial or casual interaction with coworkers and supervisors” given her
17 “typically appropriate interactions with treatment providers except for the two
18 failed attempts at inpatient substance abuse treatment and the fact that she had
19 boyfriends and stayed with various friends during the relevant period.” *Id.* First,

1 Plaintiff failed to challenge this portion of the ALJ's determination. ECF No. 18 at
2 12-13. As such, the Court is not required to address them. *See Carmickle v.*
3 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (The Court
4 does not address findings that the claimant failed to argue with specificity in his
5 briefing.). Second, had Plaintiff properly challenged this reasons, inconsistency
6 with the majority of objective evidence is a specific and legitimate reason for
7 rejecting physician's opinions. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
8 1190, 1195 (9th Cir. 2004). As addressed above, Plaintiff's actions surrounding
9 the admittance to inpatient treatment appear to be inconsistent with the rest of the
10 record and perhaps premeditated. Therefore, the ALJ's conclusion that Plaintiff
11 maintained good relationships with providers and was able to maintain romantic
12 and platonic relationships is supported by substantial evidence and meets the
13 specific and legitimate standard.

14 Next, the ALJ assigned "limited weight" to the portion Dr. Dougherty's
15 medical source statement finding that Plaintiff would likely have difficulty
16 completing a normal workday/workweek without interruption from her depression,
17 anxiety and PTSD symptoms and that these conditions would likely make it
18 difficult to deal with the stress encountered in the workplace. Tr. 40. The ALJ's
19 basis for this conclusion was that Plaintiff "apparently had the resources to obtain
20 medications once she began receiving state assistance following the evaluation

1 with Dr. Barnard, but has elected not to take any psychotropic medication. This
2 indicates she did not perceive her mood or anxiety symptoms as troublesome
3 enough to warrant medication.” Tr. 40.

4 Generally, the fact that a condition can be remedied by medication is a
5 legitimate reason for discrediting an opinion. *Warre v. Comm'r of Soc. Sec.*
6 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). Here, because Plaintiff failed to
7 consistently take her prescribed medication, there is no record supporting the
8 notion that Plaintiff’s impairments would improve with the use of medications.
9 Therefore, this reason fails to meet the specific and legitimate standard. However,
10 any error resulting from the ALJ’s reliance on this reason is harmless because Dr.
11 Dougherty limited Plaintiff’s ability to complete a normal workday/workweek and
12 deal with stress for two reasons (1) her motivation and (2) her anxiety and
13 depression. Tr. 508. As addressed above, Dr. Dougherty’s opinion was provided
14 lesser weight because of his reliance on Plaintiff’s motivation and medical
15 providers are not considered qualified to issue opinions based on non-medical
16 factors.

17 As such, the ALJ provided legally sufficient reasons to provide lesser weight
18 to Dr. Dougherty’s opinion.

19

20

1 **B. Adverse Credibility Finding**

2 Plaintiff faults the ALJ for failing to provide specific, clear and convincing
3 reasons for discrediting her symptom claims. ECF No. 18 at 14-20.

4 An ALJ engages in a two-step analysis to determine whether a claimant's
5 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must
6 determine whether there is objective medical evidence of an underlying
7 impairment which could reasonably be expected to produce the pain or other
8 symptom alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
9 "The claimant is not required to show that her impairment could reasonably be
10 expected to cause the severity of the symptom she has alleged; she need only show
11 that it could reasonably have caused some degree of the symptom." *Vasquez v.*
12 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

13 Second, "[i]f the claimant meets the first test and there is no evidence of
14 malingering, the ALJ can only reject the claimant's testimony about the severity of
15 the symptoms if she gives 'specific, clear and convincing reasons' for the
16 rejection." *Ghanim*, 763 F.3d at 1163 (internal citations and quotations omitted).
17 "General findings are insufficient; rather, the ALJ must identify what testimony is
18 not credible and what evidence undermines the claimant's complaints." *Id.*
19 (quoting *Lester*, 81 F.3d at 834); *Thomas*, 278 F.3d at 958 ("[T]he ALJ must make
20 a credibility determination with findings sufficiently specific to permit the court to

1 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The
2 clear and convincing [evidence] standard is the most demanding required in Social
3 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
4 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

5 In making an adverse credibility determination, the ALJ may consider, *inter*
6 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
7 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s
8 daily living activities; (4) the claimant’s work record; and (5) testimony from
9 physicians or third parties concerning the nature, severity, and effect of the
10 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

11 The ALJ found that Plaintiff’s impairments could reasonably be expected to
12 result in the alleged symptoms, but that Plaintiff’s statements concerning the
13 intensity, persistence, and limiting effects of her symptoms were “not entirely
14 credible,” stating “the degree of debility she has alleged is not borne out by the
15 objective evidence of record or by the consistency of her own reported and
16 demonstrated functional ability.” Tr. 34. The ALJ addressed additional, more
17 specific reasons: (1) Plaintiff’s lack of medication usage renders her reports less
18 persuasive, Tr. 36; (2) Plaintiff’s activities are inconsistent with the reported
19 severity of symptoms, Tr. 37; and (3) Plaintiff’s inconsistent statements concerning
20 drug and alcohol usage renders her self-reports less than fully credible, Tr. 37.

1 1. *Lack of Medication*

2 The ALJ found Plaintiff “has not perceived a need for psychotropic
3 medication since she obtained state assistance, which renders the severity of
4 symptoms she has alleged less persuasive.” Tr. 36. The type, dosage,
5 effectiveness and side effects of medication taken to alleviate pain or other
6 symptoms is a relevant factor in evaluating the intensity and persistence of
7 symptoms. 20 C.F.R. §§ 404.1529(c)(3)(iv)-(v), 416.929(c)(3)(iv)-(v) (2011).¹
8 The lack of prescription medication is an appropriate consideration in determining
9 credibility. *See Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998) (noting
10 claimant’s use of nonprescription medication as a factor supporting credibility
11 determination). Moreover, in the absence of “medical evidence” showing that
12 Plaintiff’s resistance to treatment is caused by her mental illness, the ALJ is
13 permitted to reasonably infer that a lack of treatment is attributable to personal
14 preference and is inconsistent with a Plaintiff’s complaints. *Molina*, 674 F.3d at
15 1114.

16
17 _____
18 ¹ As of March 27, 2017, C.F.R. §§ 1529(c) and 416.929(c) were amended. The
19 ALJ rendered his decision on February 18, 2015, thus, the Court applies the
20 versions effective June 13, 2011.

1 The ALJ noted that in early 2012, Plaintiff received medications and
2 reported no side-effects. Tr. 36 (citing Tr. 372). As of March 2012, a treatment
3 note indicates that she was more stable and improved, but was dealing with
4 situational anger about her living situation and having to attend inpatient substance
5 abuse treatment. Tr. 36 (citing Tr. 374-75). The ALJ further noted that in June
6 2012, Plaintiff was willing to engage in counseling and group therapy. Tr. 35
7 (citing Tr. 336). In December 2012, Plaintiff wanted counseling, but not
8 medications. Tr. 35 (citing Tr. 331). The ALJ specifically noted that in February
9 2013, Plaintiff was approved to receive financial assistance, which would permit
10 more treatment “if desirable.” Tr. 36 (citing Tr. 326). Plaintiff continued
11 counseling, but as of December 2014, was not receiving any psychotropic
12 medications. Tr. 36 (citing Tr. 494).

13 Plaintiff challenges the ALJ’s finding, contending the ALJ failed to consider
14 Plaintiff’s reasons for not receiving psychotropic medication, including her
15 inability to pay for medication and her mental impairments. ECF No. 18 at 16-17.
16 Here, the ALJ specifically noted that Plaintiff did not take medication after she
17 “was approved for state financial assistance,” Tr. 36, indicating the ALJ considered
18 and rejected Plaintiff’s contention that her lack of medication was due to an
19 inability to pay for it. *See* Tr. 411 (Plaintiff has assistance from state, Medicaid,
20 which will assist with payment for mental health treatment services). Plaintiff has

1 also alleged that she forgets to take her medication as a result of her mental health
2 impairments. ECF No. 18 at 16-17. There is substantial evidence in the record
3 that Plaintiff adamantly opposed taking medications, which undermines her
4 allegations that she forgets. *See, e.g.*, Tr. 331 (Dec. 12, 2012 treatment note,
5 Plaintiff stated “she doesn’t want any medications,” she only wanted therapy); Tr.
6 425 (Jan. 7, 2013 treatment summary, although Plaintiff said she “forgets” to take
7 her medication, upon further questioning, treatment provider concluded “the truth
8 of the matter is she is making a choice not to take it.”). The ALJ reasonably
9 concluded that Plaintiff not taking psychotropic medication undermines her
10 symptom complaints. This was a specific, clear and convincing reason to discredit
11 her symptoms.

12 2. *Plaintiff’s Activities*

13 Next, the ALJ found Plaintiff’s symptom reports less than fully credible
14 because the record does not support her claims that she has difficulty dealing with
15 people to the severity she alleges. Tr. 37. An ALJ may cite inconsistencies in a
16 claimant’s statements and between a claimant’s testimony and the objective
17 medical evidence in discounting the claimant’s testimony. *Bray*, 554 F.3d at 1227.

18 Here, the ALJ noted that in a February 2013 psychological evaluation,
19 Plaintiff reported that she had problems with her temper and would pound walls
20 and yell at people. Tr. 37 (citing Tr. 273). However, as addressed above, the

1 record is absent of any evidence of Plaintiff losing her temper except for the two
2 attempts at rehab, which are arguably preplanned outbursts.

3 Additionally, the ALJ noted that throughout the record, Plaintiff reported
4 activities that were inconsistent with her claimed difficulty in dealing with others:
5 she reported having a boyfriend, Tr. 331; she moved to Spokane with a new
6 boyfriend, Tr. 433; and she reported getting along with her bosses, coworkers, and
7 customers, Tr. 498. Tr. 37. Plaintiff asserts, as an alternative to the ALJ's reliance
8 on these activities as inconsistent with her reports, that these activities actually
9 show her emotional instability and impulsive actions. ECF No. 18 at 19.
10 However, if the evidence is susceptible to more than one rational interpretation, the
11 court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
12 1097. Therefore, the ALJ's second reason meets the specific, clear and convincing
13 standard.

14 3. *Inconsistent Statements Regarding Substance Abuse*

15 Next, the ALJ discounted Plaintiff's symptom testimony because she made
16 inconsistent statements regarding her substance abuse. Tr. 37. In evaluating the
17 credibility of symptom testimony, the ALJ may utilize ordinary techniques of
18 credibility evaluation, including prior inconsistent statements. *See Smolen v.*
19 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). Conflicting or inconsistent statements
20 concerning drug use can contribute to an adverse credibility finding. *Thomas*, 278

1 F.3d at 959. In support of this finding, the ALJ cited Plaintiff's testimony during
2 the November 2014 hearing that she had last used illicit drugs in October 2013,
3 which was consistent with her report to the consultative examiner in December
4 2014. Tr. 37 (citing Tr. 536, 497). However, the treatment records indicate that
5 she relapsed and used methamphetamine in late January 2014 and refused
6 substance abuse treatment. Tr. 37 (citing Tr. 450). Moreover, in July 2014, she
7 told a treatment provider she had last used methamphetamine a few months prior,
8 which would have been April or May 2014. Tr. 37 (citing Tr. 435). The ALJ also
9 noted that Plaintiff provided inconsistent and inaccurate information regarding why
10 she was removed from an inpatient substance abuse treatment facility. Tr. 35. The
11 ALJ's conclusion that she inconsistently reported to treatment providers and the
12 ALJ her most recent drug activity is supported by the record.

13 Plaintiff does not challenge the finding that Plaintiff made inconsistent
14 statements regarding her substance abuse, instead contends it was error to rely on
15 those inconsistent statements as contrary to S.S.R. 16-3p. ECF No. 18 at 18. First,
16 S.S.R. 16-3p is not applicable here because it became effective March 28, 2016,
17 after the date of the ALJ's decision. *See Garner v. Colvin*, 626 Fed. Appx 699,
18 701 (9th Cir. 2015). Moreover, Plaintiff's claim that this finding is not probative
19 of Plaintiff's credibility about her symptom complaints is unavailing; particularly
20 here, where Plaintiff gave inconsistent statements regarding her substance abuse

1 during the period in which she was alleging disability due to mental impairments.
2 Finally, Plaintiff alleges for the first time in the reply brief, ECF No. 21 at 5-6, that
3 the ALJ improperly relied on Plaintiff's drug use and relapses, as opposed to her
4 inconsistent statement. Plaintiff's allegation is unsupported. The ALJ concluded
5 Plaintiff's "inconsistent statement concerning when she last used
6 methamphetamine show her self-report is not entirely reliable." Tr. 37.

7 As such, this was a clear and convincing reason to discredit Plaintiff's
8 symptom claims.

9 **CONCLUSION**

10 After review, the Court finds that the ALJ's decision is supported by
11 substantial evidence and free of harmful legal error.

12 **IT IS ORDERED:**

13 1. Plaintiff's motion for summary judgment (ECF No. 18) is **DENIED**.
14 2. Defendant's motion for summary judgment (ECF No. 20) is **GRANTED**.

15 The District Court Executive is directed to file this Order, enter
16 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
17 **THE FILE**.

18 DATED September 29, 2017.

19 *s/Mary K. Dimke*
20 MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE